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Supreme Court, U.S.
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No. 07

IN THE

Supreme Court of the United States

MICHAEL J. KELLY, SR., *ET AL.*
Petitioners

v.

UNITED STATES OF AMERICA

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether 18 U.S.C. § 922(v)(1) violates the Second Amendment to the United States Constitution.

2) Whether a seizure of firearms was lawful under the "plain view" doctrine where the seizure occurred after the agents who discovered the firearms moved them to another location for another agent to examine them because the discovering agents could not determine if the firearms were unlawfully possessed.

3) Whether 18 U.S.C. § 922(v)(1) exceeds Congress' power under the Commerce Clause.

4) Whether application of a penal statute, 26 U.S.C. § 5845(b)("machinegun" includes any weapon which can be "readily restored" to shoot), may be based upon the knowledge and skills of an expert.

PARTIES TO THE PROCEEDING

The parties to the criminal proceeding are Michael J. Kelly, Sr. and the United States of America.

The parties to the civil *in rem* forfeiture proceeding are Michael J. Kelly, Sr.; William A. Thomas; Gary K. Beach; Allen Fehlings; Cecil P. Smith, Jr.; Eugene Gzsanka; Donald P. Sass; Anthony J. Fabian; Frank Bliss; Mathew C. Healey; Richard J. Vieira, and the United States of America.

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OPINION BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit affirming Kelly's convictions and the forfeiture of firearms is unpublished and is printed in the Appendix ("App.") at App. 1a.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit affirmed Kelly's convictions and the forfeiture of firearms on August 14, 2007. A timely petition for rehearing was denied on September 11, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

UNITED STATES CONSTITUTION

> A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

U.S. Const., Amend. II.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const., Amend. IV.

STATUTES

> The term "semiautomatic assault weapon" means -
>
> * * *
>
> (B) a semiautomatic rifle that has an ability to accept a detachable magazine and has at least 2 of -
>
> (i) a folding or telescoping stock;
>
> (ii) a pistol grip that protrudes conspicuously beneath the action of the weapon;
>
> (iii) a bayonet mount;
>
> (iv) a flash suppressor or threaded barrel designed to accommodate a flash suppressor; and
>
> (v) a grenade launcher . . . .

18 U.S.C. § 921(a)(30).

> It shall be unlawful for a person to manufacture, transfer, or possess a semiautomatic assault weapon.

18 U.S.C. § 922(v)(1).[1]

> The term "machinegun" means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more

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[1] § 922(v) was repealed effective September 13, 2004.

> than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon . . . .

26 U.S.C. § 5845(b).

STATEMENT OF THE CASE

(i) Proceedings in the Courts Below

Kelly was indicted on March 4, 2004 in a 206 count second superceding indictment. In Count 98, Kelly was charged with violating 26 U.S.C. § 5861 for possessing an unregistered Uzi machinegun receiver. In Count 205, Kelly was charged with violating 18 U.S.C. § 922(v)(1) for possessing two (2) semiautomatic assault weapons. Prior to trial, Kelly filed a motion to suppress the firearms which were the basis for Counts 98 (Uzi receiver) and 205 (two "semiautomatic assault weapons"), and a motion to dismiss Count 205 because 18 U.S.C. § 922(v)(1) violated the Second Amendment to the United States Constitution. The district court held an evidentiary hearing on Kelly's motion to suppress, at which the Government called a single witness, and denied the motion. The district court also denied the motion to dismiss.

After a lengthy jury trial, Kelly was acquitted of all but Counts 95-98 and 205. In Counts 95-97, Kelly was convicted of violating 18 U.S.C. § 922(b)(3) for transferring M-14A1 semiautomatic rifle receivers to residents of states other than the state in which his

licensed premises was located.[2] In Count 98, Kelly was convicted of violating 26 U.S.C. § 5861 for possessing an unregistered Uzi machinegun receiver. In Count 205, Kelly was convicted of violating 18 U.S.C. § 922(v)(1) for possessing two (2) semiautomatic assault weapons.

Following trial, Kelly timely filed a Rule 29(c) motion with respect to Counts 97-98 and 205 and a Rule 33(a) motion for a new trial as to Counts 95-96, which the district court denied. Kelly was sentenced to imprisonment for 24 months on June 24, 2005.

In a separate civil *in rem* forfeiture action, the Government sought forfeiture of 34 firearms which had been manufactured by Kelly. Some were possessed by Kelly and others had been sold to (and seized from) customers. After timely filed claims were filed by 11 claimants (including Kelly), the district court ordered the firearms forfeited.

Kelly timely appealed his convictions of Counts 95-98 and 205 to the United States Court of Appeals for the Fourth Circuit, and the 11 claimants (including Kelly) timely filed appeals to that court of the order of forfeiture. The court of appeals consolidated the appeals and affirmed the convictions and the judgment of forfeiture in an unpublished decision dated August

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[2] For purposes of Counts 95-97, the Government asserted only that the receivers were semi-automatic receivers, not machinegun receivers.

14, 2007. A timely petition for rehearing was denied on September 11, 2007.

(ii) Statement of Facts

Kelly was a federally licensed firearms manufacturer who manufactured and sold M-14A1 semi-automatic receivers[3] from torch cut front and rear sections of M-14 machinegun receivers which had been demilitarized in or about 1975 and which Kelly had purchased as scrap.

After Kelly began manufacturing and selling the M-14A1 semiautomatic receivers, the Bureau of Alcohol, Tobacco, Firearms & Explosives (ATF) determined that, as it interpreted 26 U.S.C. § 5845(b), the M-14A1 semiautomatic rifles were "machineguns" because they: 1) were "designed" to shoot automatically in that they had "design features" of the M-14 machinegun receiver and 2) were "readily restorable" to shoot automatically. Thus, ATF believed that Kelly was unlawfully manufacturing machineguns. ATF based its application of § 5845(b) to the M-14A1 semiautomatic receiver on the opinion of an ATF expert, Richard Vasquez, who converted an M-14A1 semi-automatic receiver to fire automatically.

On July 24, 2002, the ATF executed a search warrant on Kelly's home and business premises to search for evidence of unlawful manufacturing of M-

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[3] The receiver is the primary part of a firearm which is the housing into which the firing mechanism parts are mounted.

14A1 rifles. During the course of the search, several firearms not described in the warrant were found and seized, including an Uzi receiver (marked as semi-automatic, equipped with a semi-automatic firing mechanism, and without a barrel, bolt, or spring), a Maadi semiautomatic rifle, and an FAL semiautomatic rifle.

Vasquez participated in the search by stationing himself in the middle of the family room in the basement of Kelly's home. Agents conducting the search then brought firearms to him for examination to determine if the firearms were lawfully possessed by Kelly. Three of the firearms brought to him for such examination were the Uzi receiver and the Maadi and FAL semiautomatic rifles. Vasquez, however, did not know from where the firearms had been taken by the agents, how the firearms had been stored where they were taken by the agents, or what the agents had first done with the firearms when they were discovered. The Government offered no other evidence concerning the search for, or the seizure of, the Uzi receiver, the Maadi semiautomatic rifle, and the FAL semiautomatic rifle, other than Vasquez's inspection of these three firearms.

With respect to the Uzi receiver, Vasquez concluded that the receiver was a machinegun receiver after he removed the top cover to examine the interior of the receiver and saw that there was no block welded to the interior wall of the receiver. The Government offered no evidence that Vasquez had any knowledge

that the Uzi receiver was not registered in the National Firearms Registration and Transfer Record (NFRTR).[4]

With respect to the Maadi and FAL rifles, Vasquez concluded that they were "semiautomatic assault weapons" by examining their features. He could not determine, however, whether the rifles were lawfully possessed on or before September 13, 1994[5] because he did not know the dates they were either imported (in the case of the Maadi) or manufactured (in the case of the FAL).

Kelly's Manufacturing Process for the M-14A1 semi-automatic receivers: Each receiver Kelly manufactured was manufactured from a rear section and a front section of two (2) different M-14 receivers. The torch cutting removed approximately 1/4" to 3/8" of metal from the center of the M-14 machinegun receivers. The rear section included, on the right side, a selector pivot housing (or stud or tab) (hereinafter "selector stud"). The selector stud is a piece of metal which extends below the main body of the receiver and

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[4] A machinegun may be lawfully possessed if registered in the NFRTR.

[5] A "semiautomatic assault weapon" may be lawfully possessed if lawfully possessed on or before September 13, 1994. See 18 U.S.C. § 922(v)(2)("Paragraph (1) shall not apply to the possession or transfer of any semiautomatic assault weapon otherwise lawfully possessed under Federal law on the date of the enactment of this subsection").

has a hole through which the selector shaft is mounted.

To manufacture the receivers, Kelly removed approximately 3/8" to 7/16" additional metal from each of the two (2) sections by torch-cutting from the left side of the receiver ends. Next, the selector stud was removed from the rear section by grinding. A small nub measuring about 1/4" long by 1/8" in height remained. After the selector stud was removed, the front and rear sections were placed on a weld fixture to ensure the precise length of the newly manufactured receiver. About 1/2" to 5/8" of weld build-up was added to the cut ends of the rear and front sections to restore the missing metal; the sections were then welded together. After welding, the joined sections were machined and heat-treated.

After completing the heat treatment process, a dummy, non-functional selector shaft and lock, and the upper portion of a sear release (which would be visible on the exterior of an M-14 machinegun receiver), were welded onto the completed receiver 1/16" to 3/32" forward of the position in which an actual selector shaft and lock would have been located on an M-14. Any excessive metal on the interior side of the completed receiver was removed by grinding.

Vasquez's Conversion Process: To convert the M-14A1 semi-automatic receiver to fire automatically, Vasquez first manually cut the dummy, non-functional selector shaft out using a carbide burr on a Dremmell tool. He also cut off the portion of sear release. He

then switched bits to a conical type bit. After about 30 minutes, he had cut a hole completely through the shaft. To clean up the hole so the sear release will go over, he then cut again with the slitting disk, which took approximately 10 minutes. Vasquez then assembled parts (from ATF's inventory) to the converted receiver. The process took approximately 50 minutes.

When Vasquez first attempted to fire the assembled rifle automatically (using a three (3) round magazine), it fired only a single round. To correct this condition, Vasquez added a small portion of weld to that area of the sear release and build it up. To add the weld, Vasquez used a TIG welder, a process that took a couple of minutes. After alteration of the sear release, the rifle shot automatically.

Vasquez's Expert Qualifications: Prior to working for ATF, Vasquez was a firearms instructor and a gunsmith for Diplomatic Security Service, where he repaired agency firearms, including replacing receivers and barrels, triggers, stocks, every part besides the receiver. Vasquez was also in the United States Marine Corps for twenty-one years where he was a Chief Instructor at the Weapons Rebuild Facility at Quantico, Virginia, which is a gunsmith facility which handles all the special weapons that the Marine Corps provides to the Infantry. His title was advance armorer. His training consisted of a fifty-two week on-the-job training program where he learned to be a basic gunsmith. He learned how to use a lathe, a

milling machine, and welders, and to fabricate parts to manufacture precision weapons. Vasquez also attended the U.S. Army's Machinist Course, a six-month course where he learned how to fabricate objects using milling machines, grinders, welders, and lathes. Vasquez also attended civilian gunsmith training courses, including the Glock Arms course, the Smith and Wesson Armorers course, the Heckler and Koch Armorers course, and the Ruger course.

With respect to the M-14 in particular, Vasquez learned how to work on the M-14 in his initial armorer course in 1974 and was associated with the M-14 his entire career. In addition to his activities in the Marine Corps, Vasquez built and sold match-grade M-14s for competitive shooters and worked on thousands of M-14s.

ARGUMENT

I.

18 U.S.C. § 922(v)(1) VIOLATES THE SECOND AMENDMENT TO THE UNITED STATES CONSTITUTION

The court of appeals held that the Second Amendment "does not confer an absolute *individual* right to bear firearms" and reiterated its earlier holding in *Love* v. *Pepersack,* 47 F.3d 120 (4th Cir.1995), where the court "adopted the collective rights theory, interpreting the Amendment to protect the states' right to organize and arm militias." App. at 8a.

This Court has recently granted a petition for writ of certiorari in *Parker et al.* v. *District of Columbia, et al.*, 478 F.3d 370 (D.C. Cir. 2007), *cert. granted, sub nom, District of Columbia* v. *Heller*, No. 07-290 (11/20/07), to address the question of whether provisions of District of Columbia law:

> violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in heir homes.

Because *Heller* will certainly address whether the Second Amendment guarantees an individual right to keep firearms in the home, or whether it protects a "collective right" to "protect the states' right to organize and arm militias," the Court should hold this petition in abeyance until *Heller* is decided. If *Heller* is affirmed, the Court should grant this petition, vacate the court of appeals' decision, and remand the case for further consideration by the court of appeals. If *Heller* is reversed, the Court should grant this petition on the remaining grounds.

II.

SEIZURE OF THE THREE FIREARMS WAS UNLAWFUL UNDER THE "PLAIN VIEW" DOCTRINE

The Government argued that, although the Uzi receiver and the Maadi and FAL rifles were not referenced in the search warrant, they were lawfully

seized under the Fourth Amendment's "plain view" doctrine:

> [I]f police are lawfully in a position from which they view an object, if its incriminating character is immediately apparent, and if the officers have a lawful right of access to the object, they may seize it without a warrant. See *Horton* v. *California*, 496 U.S. 128, 136-137 (1990); *Texas* v. *Brown*, 460 U.S. 730, 739 (1983) (plurality opinion). If, however, police lack probable cause to believe that an object in plain view is contraband without conducting some further search of the object — *i.e.*, if "its incriminating character [is not] 'immediately apparent,'" *Horton, supra*, at 136 — the plain-view doctrine cannot justify its seizure.

Minnesota v. *Dickerson*, 508 U.S. 366, 37 (1993).[6]

In holding that seizure was lawful under the under the "plain view" doctrine, the court of appeals stated:

> We have previously rejected the argument that an item's illegality must be apparent to the searching officer at the precise moment that he spots it. *See United States* v. *Jackson*, 131 F.3d 1105 (4th Cir. 1997).

App. at 6a.

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[6] It was the Government's burden to present evidence that showed that this exception to the warrant requirement applied. See *United States* v. *Jeffers*, 342 U.S. 48, 51 (1951)("the burden is on those seeking the exemption to show the need for it").

In applying this understanding of the "immediately apparent" prong of the "plain view" doctrine, the court of appeals explained only that the ATF agents:

> did not unlawfully search or seize the three weapons prior to the time Vasquez determined that they were possessed unlawfully. The agents' decision to take the guns to Vasquez, who was located on the premises, was clearly "[]related to the objectives of the authorized intrusion" and therefore not an additional or unlawful search. *Arizona* v. *Hicks*, 480 U.S. 321, 325 (1987).

App. at 7a.

There was, however, no evidence concerning the discovery of the three firearms, *e.g.*, the locations where the firearms were found or how they were situated when they were found or what action the agents took with the firearms upon discovering them. Thus, there was no evidence that the "incriminating character" of the three firearms was "immediately apparent" to the agents who discovered them. Accordingly, the court of appeals could not have concluded that the search or seizure was lawful.

In holding that the agents did not unlawfully search or seize the three firearms prior to the time Vasquez determined that they were possessed unlawfully, the court of appeals' decision conflicts with *Arizona* v. *Hicks*, which stated:

> But taking action, unrelated to the objectives of the authorized intrusion, which *exposed to view concealed* portions of the apartment or its *contents*, did produce a new invasion of respondent's privacy unjustified by the exigent circumstance that validated the entry.

480 U.S. at 325 (emphasis added).

In *Arizona* v. *Hicks*, "the shooter, victims, and weapons [were] the lawful objective of [the officer's] entry into the apartment." 480 U.S. at 325. In the case at bar, the warrant was issued to search for evidence of unlawful manufacturing of M-14A1 rifles. Thus, the "objective of the authorized intrusion" was unlawful manufacturing of M-14A1 rifles; taking the Uzi and the two "semiautomatic assault weapons" to Vasquez was "unrelated to the objectives of the authorized intrusion . . . ." Accordingly, if the discovering agents searched the three firearms, they exposed to view portions of the firearms, which was a new invasion of Kelly's privacy.

Because the Government offered no evidence concerning the discovery of the three firearms, it has not shown that the seizure was lawful.

The court of appeals' decision also conflicts with the decisions of the Sixth, Seventh, Tenth, and District of Columbia Circuits with respect to the immediacy prong of the "plain view" doctrine.

In *United States* v. *Szymkowiak*, 727 F.2d 95 (6th Cir. 1984), police officers, while conducting a search with a warrant for specified items of jewelry and a T.V. set, found an AR-15 and other firearms. The officers "could not determine whether the guns seized were

designed or specifically adapted to fire a succession of bullets. They therefore could not determine whether possession of these guns was illegal." 727 F.2d 96. The officers thus asked ATF Agent Haverstick to come to the apartment to look at the firearms. Haverstick "could not clearly determine without disassembling the firearms whether they had been illegally adapted for fully automatic performance." 727 F.2d at 97.

The Sixth Circuit concluded that a reviewing court must "determine whether, under the circumstances of each case, probable cause was both 'immediate' and 'apparent' to the executing officers from the nature of the object viewed." *Id.* With respect the immediacy prong, the court stated:

> [E]ven if probable cause of criminality were "apparent" to the ATF expert, such probable cause clearly was not "immediately" so. The record in this case is clear that *the executing officers who discovered the weapon could not "at the time" of discovery determine whether its possession was unlawful.*

Id. (emphasis added).

In *Shamaeizadeh* v. *Cunigan*, 338 F.3d 535 (6th Cir. 2003), the Sixth Circuit emphasized this point:

> Although an officer need not be sure an item in plain view is contraband in order to seize it, "when an item appears suspicious to an officer but further investigation is required to establish probable cause as to its association with criminal activity, the item is not immediately incriminating." *United States v.*

> *McLevain,* 310 F.3d 434, 443 (6th Cir.2002) (quotation omitted).

338 F.3d at 555.

The same is true here; the agents who discovered the three firearms could not, at the time of the discovery, determine whether possession was lawful and thus brought the firearms to Vasquez.

The Seventh Circuit has held with respect to the "immediately apparent" requirement of the "plain view" doctrine:

> If the officer, unsure of what the object is, needs to uncover what he cannot already see to verify that it is probative of criminal activity, that verification process entails a search. As the Supreme Court held in *Horton,* warrantless searches of that kind cannot be justified under the plain view doctrine, only seizures. *Id.* Thus, for a plain view seizure to be proper, the object must already be sufficiently exposed that a further search to discover or verify its character is unnecessary- its exposure must be such that it is no longer protected by the privacy interests of its possessor.

United States v. *Brown,* 79 F.3d 1499, 1508 (7th Cir.1996).

Similarly, the Tenth Circuit has held that:

> upon viewing the object, the officer must *at that moment* have probable cause [footnote

> omitted] to believe the object to be contraband or evidence of illegal activity.

United States v. *Tucker*, 305 F.3d 1193, 1202-03 (10th Cir. 2002)(emphasis added).

The court of appeals in the instant case further stated that the movement of the firearms by the agents from unknown parts of Kelly's house to Vasquez did not "constitute an unlawful seizure because the agents did not 'meaningfully interfere' with Kelly's possessory interest in the guns." App. at 11a (citing *Arizona* v. *Hicks*, *supra*, at 324).

Arizona v. *Hicks*, however, held that "the mere recording of the serial numbers did not constitute a seizure" because the mere recording, "[i]n and of itself," "did not 'meaningfully interfere' with respondent's possessory interest in either the serial numbers or the equipment, and therefore did not amount to a seizure." 480 U.S. at 324. As to the *movement* of property, *Arizona* v. *Hicks* held that:

> moving of the equipment, however, did constitute a "search" separate and apart from the search for the shooter, victims, and weapons that was the lawful objective of his entry into the apartment.

480 U.S. at 324-25.

Accordingly, the court of appeals' decision here is directly in conflict with *Arizona* v. *Hicks*.

In support of its holding conflicting with *Arizona* v. *Hicks*, the court of appeals relied on *United States*

v. *Garces*, 133 F.3d 70 (D.C. Cir. 1998), (App. at 11a),which stated in pertinent part:

> [T]he incriminating nature of the item must have become apparent, in the course of the search, without the benefit of information from any unlawful search or seizure. [fn 3].

133 F.3d at 75.

Footnote 3 stated:

> Such unlawful search might, of course, include search of the object itself. See *Minnesota* v. *Dickerson*, 508 U.S. 366, 375 (1993) ("If . . . the police lack probable cause to believe that an object in plain view is contraband without conducting some further search of the object ... the plain-view doctrine cannot justify its seizure."). But any subsequent legitimate steps in the search process are as effective as prior steps in supplying the requisite knowledge.

133 F.3d at 75, n.3.

Thus, the very thing against which *Garces* warned occurred here; a search of the firearms was made when they were picked up by the agents and delivered to Vasquez so that he could examine them. Thus, the court of appeals decision here conflicts with *Garces*.[7]

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[7] The court of appeals also relied upon *United States* v. *Menon*, 24 F.3d 550 (3d Cir. 1994), which the court of appeals summarized as "stating that agent executing a search warrant did not seize documents when she moved them to another room for a fellow officer to inspect." App. at 7a. In *Menon*, however, there was evidence concerning how the executing officer discovered the documents. In the instant case, by contrast, there is no such

The "incriminating character" of the three firearms was also not "immediately apparent" to Vasquez. With respect to the Uzi receiver, Vasquez concluded that it was a machinegun receiver only after he removed the top cover to examine the interior and saw that there was no block welded to the interior wall. Just as *Arizona* v. *Hicks* held that the movement of a phonograph to view its serial number was an unlawful search, 480 U.S. at 324-25, so the removal of the top cover to examine the interior was an unlawful search. Moreover, the Government offered no evidence that Vasquez had any knowledge that the Uzi receiver was not registered in the National Firearms Registration and Transfer Record (NFRTR).[8]

With respect to the Maadi and FAL rifles, Vasquez testified that he concluded that they were "semiautomatic assault weapons" by examining their features. But Vasquez could not determine prior to the seizure whether they were lawfully possessed on or before September 13, 1994. Thus, he did not know whether possession of the rifles was unlawful because, if they had been lawfully possessed on or before September 13, 1994, their possession would not have been unlawful.

To resolve the conflicts with *Arizona* v. *Hicks* and the decisions of the Sixth, Seventh, Tenth, and District

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evidence so that it is impossible to know whether the search and movement of the firearms was consistent, or inconsistent, with *Menon*.

[8] A machinegun may be lawfully possessed if registered in the NFRTR.

of Columbia Circuits, the Court should grant this petition.

III.

18 U.S.C. § 922(v)(1) EXCEEDS CONGRESS' COMMERCE POWER

18 U.S.C. § 922(v)(1) provided:

> (1) It shall be unlawful for a person to manufacture, transfer, or possess a semiautomatic assault weapon.

The court of appeals held that 18 U.S.C. § 922(v)(1) "was plainly intended to reduce the flow of those weapons in interstate commerce." App. at 8a. Further, the court of appeals noted that "[r]egulations of intrastate activities that affect the supply or demand of a commodity are well within Congress's Commerce Clause powers." App. at 8a. This holding conflicts with *United States* v. *Lopez*, 514 U.S. 549 (1995), as clarified in *Gonzales* v. *Raich*, 545 U.S. 1 (2005).

Gonzales v. *Raich* held that Congress has power under, Art. I, Sec. 8, Cl. 3 of the Constitution, "to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce." 545 U.S. at 17. The Court also explained of its previous decision in *Lopez*, in which it invalidated 18 U.S.C. § 922(q)(1)(A) ("a brief, single-subject statute making it a crime for an individual to possess a gun in a school zone"):

> The Act did not regulate any economic activity and did not contain any requirement that the possession of a gun have any connection to past interstate activity or a predictable impact on future commercial activity.

545 U.S. at 23.

The Court also observed that, in *United States* v. *Morrison*, 529 U.S. 598 (2000), it invalidated the federal civil remedy for the victims of gender-motivated crimes of violence, 42 U.S.C. § 13981, "[d]espite congressional findings that such crimes had an adverse impact on interstate commerce" because, "like the statute in *Lopez*, it did not regulate economic activity." 545 U.S. at 25. The Court distinguished the statute at issue in *Gonzales* v. *Raich* as follows:

> Unlike those at issue in *Lopez* and *Morrison*, the activities regulated by the CSA are quintessentially economic. "Economics" refers to "the production, distribution, and consumption of commodities." Webster's Third New International Dictionary 720 (1966). The CSA is a statute that regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market.

Gonzales v. *Raich*, 545 U.S. at 25.

Like § 922(q)(1)(A), at issue in *Lopez*, § 922(v) is a "brief, single-subject statute" which, as relevant here, did not purport to regulate economic activity as it regulated mere intrastate possession, not production, distribution, and consumption of commodities, and "did not contain any requirement that the possession

of a gun have any connection to past interstate activity or a predictable impact on future commercial activity." *Raich*, 545 U.S. at 23.

Nothing in *Raich* suggests that imposing criminal penalties on the intrastate possession of a commodity for the purpose of affecting the supply or demand of a commodity is within Congress's Commerce Clause powers.

In addition to not being economic activity, the intrastate possession of a "semiautomatic assault weapon" did not "substantially" affect interstate commerce as required by *Lopez*, 514 U.S. at 559.

A court may consider "even congressional committee findings, regarding effect on interstate commerce" (*Lopez*, 514 U.S. at 562) to enable the court to "evaluate the legislative judgment that the activity in question substantially affected interstate commerce . . . ." 514 U.S. at 563.

The type of findings which support the constitutionality of a statute are exemplified in *Maryland* v. *Wirtz*, 392 U.S. 183 (1968), where the findings relied on by the Court were directly related to whether there was a substantial effect on interstate commerce.

> Congress had found that substandard wages and excessive hours, when imposed on employees of a company shipping goods into other States, gave the exporting company an advantage over companies in the importing States.

392 U.S. at 189.

The Court also noted that:

> Congress stated its finding that substandard labor conditions tended to lead to labor disputes and strikes, and that when such strife disrupted businesses involved in interstate commerce, the flow of goods in commerce was itself affected.

392 U.S. at 191.

The lesson of *Wirtz*, as reiterated by *Lopez*, is manifest. For congressional findings to be relied upon, they must speak both to the specific subject matter of the regulated activity and to the effect of the regulated activity on interstate commerce. There are no congressional findings speaking to the effect on interstate commerce of the intrastate possession of "semiautomatic assault weapons," much less demonstrating that the intrastate possession of "semiautomatic assault weapons" has a substantial effect on interstate commerce.

Notably, *Lopez* agreed with the Fifth Circuit that the congressional findings relied upon by the Government in an effort to sustain § 922(q) "'[do not] speak to the subject matter of section 922(q) or its relationship to interstate commerce. Indeed, section 922(q) plows thoroughly new ground and represents a sharp break with the long-standing pattern of federal firearms legislation.'" 514 U.S. at 563. The "long-standing pattern of federal firearms legislation" refers to Congress' inclusion of a commerce element in federal firearms offenses up until the enactment of § 922(o)(enacted in 1986), § 922(q) (invalidated by *Lopez*), and § 922(v)(1). Moreover, other than

prohibiting certain high risk classes of persons from possessing firearms -- § 922(g), which includes a commerce element -- Congress had never before prohibited the possession of any type of firearm.

The Court should grant this petition to resolve the conflict with *Lopez*, as clarified in *Gonzales* v. *Raich*.

IV.

APPLICATION OF A PENAL STATUTE MAY NOT DEPEND UPON EXPERT OPINION

The court of appeals stated that the central question with respect to the forfeiture of the MKS M-14A receivers was whether they were "machineguns" as defined in 26 U.S.C. § 5845(b). App. at 11a.

26 U.S.C. § 5845(b) defines "machinegun" as:

> any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger.

Because it was "undisputed that the defendant MKS M-14As could not shoot automatically at the time of their seizure," the issue was whether they could be "readily restored" to shoot automatically. App. at 11a.

Readily: The Government's evidence was that Vasquez "made the MKS M-14A shoot automatically in approximately fifty minutes" using "a Dremmel drill, a carbide burr, and a Tig welder" and that the parts used "to restore the weapon could be purchased for approximately $79.00." App. at 11a. The court of appeals held that "Vasquez's restoration of the MKS

M-14A established probable cause to believe that the receivers were machineguns." App. at 12a.

In reaching this conclusion, the court of appeals "reject[ed] Kelly's argument" that § 5845(b) must not be applied "'based upon the knowledge and skills of an expert and what an expert may be able to accomplish, but upon the knowledge and skills of an ordinary person.'" App. at 12a. The court of appeals' adoption of a novel and unprecedented standard for the application of a penal statute, *i.e.*, that the application of a penal statute may be based upon the knowledge and skills of an expert and what an expert may be able to accomplish, not upon the knowledge and skills of an ordinary person, is in conflict with this Court's jurisprudence.

Chicago v. *Morales*, 527 U.S. 41 (1999), stated that the due process clause requires that a statute "provide the kind of notice that will enable ordinary people to understand what conduct it prohibits . . . ." 527 U.S. at 56 (emphasis added). The purpose of the fair notice requirement is:

> to enable the ordinary citizen to conform his or her conduct to the law. "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1939).

527 U.S. at 58 (emphasis added).

Thus, it is to the knowledge and skills of an ordinary person that the court must look in applying a penal statute.

The first basis for the court of appeals' conclusion, *i.e.*, that "semi-automatic weapons are complex instruments" and, therefore, "it makes little sense to inquire whether a gun can be readily restored by the ordinary person," is not supported by any authority, and the court of appeals cited none. On the contrary, two cases, albeit district court cases, have rejected the reasoning of the court of appeals. See *United States* v. *Whalen*, 337 F.Supp. 1012, 1018 (S.D.N.Y. 1972)("At trial the Government will be obliged to prove, not only that its experts, working with all the Government's resources, were able to repair the guns, but also that defendant himself would have been able to have the weapons 'readily restored to a firing condition'") and *United States* v. *Aguilar-Espinosa*, 57 F.Supp.2d 1359, 1362 (M.D. Fla. 1999)("the ability of a reasonably skilled and informed but not necessarily expert or artistic worker").

That the ordinary person standard applies is aided by the legislative history. When the "readily restored" language was first proposed, Sheldon S. Cohen, Commissioner of Internal Revenue, gave as an example of the need for the legislation machineguns which "were deactivated in such a way that simple insertion of a paper clip and removing a certain piece would make them usable again." Proposed Amendments to the National Firearms Act and the Federal Firearms Act: Hearings Before the Committee on Ways and Means, House of Representatives, 89th Cong., 1st Sess. 47 (1965). In the 90th Congress, the sponsors of the bill to add the "readily restored" language explained that "readily restored" was:

> intended to mean that only a simple mechanical operation is required to restore a weapon to a capacity of fully automatic fire.

S. Rep. 1097, 90th Cong., 2d Sess. at 280 (1968).

Accordingly, the purpose of the "readily restored" language was to encompass such actions as "simple insertion of a paper clip" or "a simple mechanical operation"; Congress did not intend that actions which required some 50 minutes of labor by a highly trained and experienced gunsmith like Vasquez was to be considered "readily." The use of tools to alter the physical structure of the receiver taking some 50 minutes, as Vasquez did here, is not a simple mechanical process similar to "simple insertion of a paper clip . . . ."

The second reason given by the court of appeals was that, "[i]n addition to expertise, we consider the time, equipment, and cost necessary to restore the weapon." App. at 12a. The "time" factor is directly related to, and dependent upon, expertise and is thus not an independent factor. With respect to equipment, the panel referred to the tools used by Vasquez, "a Dremmel drill, a carbide burr, and a Tig welder," as "three common tools . . . ." App. at 11a. Even assuming that the tools may be common, Vasquez made clear that specialized training and experience is needed to use those tools. Thus, even the "equipment" factor is dependent upon expertise.

The Government offered no evidence whatever concerning the time within which an ordinary person (or even a reasonably skilled and informed person) could accomplish what ATF's expert accomplished, or

even whether an ordinary person (or a reasonably skilled and informed person) could accomplish it all. Thus, the Government failed to show that the defendant receivers could be "readily" restored.

Restored: The court of appeals held that "Vasquez's *restoration* of the MKS M-14A established probable cause to believe that the receivers were machineguns." App. at 12a (Emphasis added). Vasquez's activity was not a "restoration."

In *Logan* v. *United States*, -- S.Ct. ----, 2007 WL 4232786 (December 4, 2007), the Court, in interpreting the word "restored," adopted the "ordinary meaning of the word 'restored,'" including the definition in the *American Heritage Dictionary* 1486 (4th ed.2000) (defining "restore" to mean "bring back into existence or use; reestablish"). See also *Webster's New World College Dictionary* (Third Edition 1997) (defining "restore" to mean "to bring back to a former or normal condition").

The term "restored" perforce means that an object was previously in a particular condition and has been returned to that previous condition. The M-14A1 receivers were not returned to a previous condition as they were not M-14 receivers; rather, because the M-14A1 receivers were new, previously nonexisting, creations as they had been manufactured from pieces of scrap from two different M-14 receivers from which

the selector stud had been removed, the process undertaken by Vasquez was not a "restoration."[9]

To resolve the conflict with *Logan*, the Court should grant this petition.

CONCLUSION

This Court should grant this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

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December, 2007

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[9] The process undertaken by Vasquez was not a restoration, but a conversion. The term "convert" means "to change from one form or use to another . . . ." *Webster's New World College Dictionary* (Third Edition 1997). 26 U.S.C. § 5845(b) recognizes a distinction between "restoration" and "conversion":

> The term "machinegun" means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include . . . any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun . . . . (emphasis added).

APPENDIX

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 05-4775

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

MICHAEL J. KELLY, SR.,

Defendant-Appellant.

No. 06-1421

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

M-K SPECIALTIES, Model M-14 Machinegun Serial Numbers: 1447797, 21954, 1082375, 1394870, 539240, 680531, 1506762, 1335989, 1359769, 1020490, 49488, 1157650, 1181446, 1325123, 1392697, 1434500, 1478082, 1497879, 1560920, 1573826, 217140, 223003, 26268, 336512, 376163, 39524, 419875, 48678, 5175, 575495, 828590, 947264, 977294, 1331982,

Defendant,

and

MICHAEL J. KELLY, SR.; WILLIAM A. THOMAS; GARY K. BEACH; ALLEN FEHLINGS; CECIL P. SMITH, JR.; EUGENE GZSANKA; DONALD P. SASS,

Claimants-Appellants,

and

ANTHONY J. FABIAN; FRANK BLISS; MATHEW C. HEALEY; RICHARD J. VIEIRA,

Claimants.

Appeals from the United States District Court for the Northern District of West Virginia, at Clarksburg. Irene M. Keeley, Chief District Judge. (CR-03-50; 1:04-cv-00041-IMK)

Submitted: August 2, 2007
Decided August 14, 2007

Before WILLIAMS, Chief Judge, and MICHAEL and GREGORY, Circuit Judges

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Affirmed by unpublished per curiam opinion.

Richard E. Gardiner, Fairfax, Virginia, for Appellants. Rita R. Valdrini, Acting United States Attorney, Randolph J. Bernard, Robert H. McWilliams, Jr., Michael D. Stein, Assistant United States Attorneys, OFFICE OF THE UNITED STATES ATTORNEY, Wheeling, West Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM

Michael J. Kelly, Sr., a federally licensed firearms dealer, was arrested after agents from the Bureau of Alcohol, Tobacco, Firearms and Explosives (BATFE) seized numerous illegal weapons from his residence and place of business, MKS Specialties, Inc. (MKS). He was convicted for five violations of federal law involving the transfer of firearms to a non-resident, the possession of unregistered machineguns, and the possession of semi-automatic assault weapons. The district court also ordered twenty-eight firearms, possessed or transferred by MKS, forfeited to the government. Kelly appeals his convictions, and he and six other claimants appeal the forfeiture order. Finding no error, we affirm the convictions and forfeiture order.

I.

Kelly owns the MKS gun dealership, located in Grafton, West Virginia. At MKS, Kelly specializes in manufacturing and distributing the MKS M-14A, a gun that he manufactures using receivers from decommissioned M-14 machineguns. (The military decommissions M-14 machineguns by torch-cutting the receiver, the frame of the gun that contains the firing mechanism, into two parts.) In June 2001 agents from the BATFE informed Kelly that the M-14 receivers he was using to manufacture the MKS M-14A were machineguns as defined in 26 U.S.C. § 5845(b). (The Firearm Owners' Protection Act makes it a crime to

possess a machinegun that was not lawfully possessed before the Act went into effect on May 19, 1986. *See* 18 U.S.C. § 922(o).) The BATFE served a cease and desist letter on Kelly, but he continued to manufacture and sell M-14 receivers and MKS M-14As.

On July 24, 2002, the BATFE executed a search warrant on Kelly's residence, which also served as his place of business. The search warrant authorized the agents to seize "[a]ll MKS M-14 receivers and all MKS M14A1 receivers and/or firearms utilizing the aforementioned receivers." S.J.A. 41. In addition to the guns listed in the warrant, the agents discovered an Uzi machinegun receiver, a Maadi semi-automatic assault rifle, an FAL semiautomatic assault rifle, and an AK-47 machinegun. The agents took the guns to BATFE agent Richard Vasquez, who was on the premises during the search, for identification. Agent Vasquez, an expert gunsmith, immediately determined that the firearms were illegal and instructed his fellow agents to seize the guns.

Kelly was indicted for 206 violations of federal law. He filed a motion to dismiss and a motion to suppress the four guns that were not listed in the search warrant. The district court denied both motions. Kelly was convicted after a jury trial on six counts: Counts 95-97 (unlawful transfer of firearms to a non-resident in violation of 18 U.S.C. § 922(b)(3)); Counts 98-99 (unlawful possession of machineguns in violation of 26 U.S.C. § 5861(d)); and Count 205 (unlawful possession of semi-automatic assault weapons in violation of 18 U.S.C. § 922(v)(1)). The district court granted Kelly's motion for acquittal on Count 99 and denied his other post-trial motions. The

court sentenced Kelly to 24 months' imprisonment on each of the five counts to run concurrently. Kelly appeals his convictions.

The government also filed a civil forfeiture action for thirty-four MKS-M14A receivers that the BATFE recovered from seventeen individuals throughout the United States. Eleven individuals, including Kelly, filed claims to the seized guns in the district court. The government alleged that the MKS M-14A firearms were unlawful machineguns and requested that they be forfeited to the government pursuant to 26 U.S.C. § 5872(a). The district court granted the government's motion for summary judgment and ordered the guns forfeited. Kelly and six other claimants appeal the forfeiture order, and this appeal has been consolidated with Kelly's appeal of his conviction.

II.

Kelly challenges his convictions on the five counts that survived post-trial motions. First, he argues that his convictions for Counts 98 and 205 should be vacated because the Uzi receiver and two semi-automatic assault weapons were unlawfully seized from his residence. Second, he argues that 18 U.S.C. § 922(v), the ban on semi-automatic assault weapons, exceeds Congress's power under the Commerce Clause and violates his Second Amendment right to bear arms. Third, he argues that the convictions on Counts 95-97 should be reversed because (a) the district court erred in instructing the jury, (b) there was insufficient evidence to support the convictions, and (c) the government's expert witness

testimony was unreliable. We consider these arguments in turn.

A.

Kelly argues that the district court erred in denying his motion to suppress the Uzi receiver (Count 98) and the two semiautomatic assault weapons (Count 205). Specifically, he says that the district court erred in holding that these weapons, which were not identified in the search warrant, were lawfully seized under the plain view exception to the warrant requirement.

Under the plain view doctrine law enforcement officers may seize an object without a warrant if (1) the officers are "lawfully in a position from which they view an object," (2) the object's incriminating character is "immediately apparent," and (3) the officers have a "lawful right of access to the object." *Minnesota v. Dickerson,* 508 U.S. 366, 375 (1993). Kelly argues that the plain view doctrine cannot justify the seizure because "it was [not] 'immediately apparent' to the agents who brought the three firearms to [agent] Vasquez that there was anything 'incriminating' about the three firearms." Appellant's Br. at 15.

We have previously rejected the argument that an item's illegality must be apparent to the searching officer at the precise moment that he spots it. *See United States v. Jackson,* 131 F.3d 1105 (4th Cir.1997) (upholding seizure of drug paraphernalia even though seizing officer did not recognize the paraphernalia's illegality until after he left the room where it was located). The "immediately apparent" prong of the plain view doctrine only requires that "the

incriminating nature of the item ... become apparent, in the course of the search, without the benefit of information from any unlawful search or seizure." *United States v. Garces,* 133 F.3d 70, 75 (D.C.Cir.1998).

The BATFE agents did not unlawfully search or seize the three weapons prior to the time Vasquez determined that they were possessed unlawfully. The agents' decision to take the guns to Vasquez, who was located on the premises, was clearly "[ ]related to the objectives of the authorized intrusion" and therefore not an additional or unlawful search. *Arizona* v. *Hicks,* 480 U.S. 321, 325 (1987). Nor did this movement of the guns constitute an unlawful seizure because the agents did not "meaningfully interfere" with Kelly's possessory interest in the guns. *Id.* at 324; *cf. Garces,* 133 F.3d at 74 ("[W] e find neither search nor seizure in [the agents'] carrying the key about the house to determine its evidentiary value."); *United States* v. *Menon,* 24 F.3d 550, 560 (3d Cir.1994) (stating that agent executing a search warrant did not seize documents when she moved them to another room for a fellow officer to inspect). Thus, we conclude that the agents' seizure of the three guns was lawful pursuant to the plain view doctrine.

B.

1.

Kelly argues that Congress exceeded its Commerce Clause powers in enacting 18 U.S.C. § 922(v)(1), which prohibits the possession of most semi-automatic assault weapons. Kelly argues that Congress does not have the power to regulate what he

describes as intrastate, non-economic activity. This argument is meritless. The Commerce Clause authorizes Congress to regulate "those activities that substantially affect interstate commerce." *United States v. Lopez,* 514 U.S. 549, 559, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995). The ban on the possession of semi-automatic assault weapons was plainly intended to reduce the flow of those weapons in interstate commerce. *See Navegar, Inc. v. United States,* 192 F.3d 1050, 1058 (D.C.Cir.1999). As the D.C. Circuit has noted, section 922(v) affects commerce by "impos[ing] criminal liability for those activities which fuel the supply and demand for such weapons." *Id.* Regulations of intrastate activities that affect the supply or demand of a commodity are well within Congress's Commerce Clause powers. *See Wickard v. Filburn,* 317 U.S. 111, 128, 63 S.Ct. 82, 87 L.Ed. 122 (1942) (holding that Congress had the power to regulate intrastate cultivation of wheat because of its effect on the national market for that commodity).

2.

Kelly also argues that the ban on semi-automatic assault weapons in section 922(v) violates his Second Amendment right to bear arms. The Second Amendment states that: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." We held in *Love v. Pepersack,* 47 F.3d 120 (4th Cir.1995), that the Second Amendment does not confer an absolute *individual* right to bear firearms. In that case we adopted the collective rights theory, interpreting the Amendment to protect the states' right to organize and arm militias. Accordingly, a

person challenging a federal gun restriction must show that his possession of the gun "bore a 'reasonable relationship to the preservation or efficiency of a well regulated militia.' " *Id.* at 124 (quoting *United States v. Miller,* 307 U.S. 174, 178, 59 S.Ct. 816, 83 L.Ed. 1206 (1939)). Kelly has not made any showing that he possessed the semi-automatic assault weapons in connection with membership in a state militia.

C.

Kelly raises several challenges to his convictions under Counts 95-97 for transferring firearms to an out-of-state resident in violation of 18 U.S.C. § 922(b)(3).

1.

Kelly argues that the district court failed to instruct the jury on Counts 95-97 that the government was required to prove that he knew the transferee was not a federally licensed firearms dealer. Section 922(b)(3) makes it unlawful for a licensed dealer to "sell or deliver ... any firearm to any person who the licensee knows or has reasonable cause to believe does not reside in ... the State in which the licensee's place of business is located." 18 U.S.C. § 922(b)(3). This section does "not apply to transactions between licensed ... dealers." *Id.* § 922(b).

The district court's instruction "taken as a whole ... fairly states the controlling law." *See United States v. Cobb,* 905 F.2d 784, 789 (4th Cir.1990) (stating standard of review for challenges to jury instructions). The court told the jury that to convict Kelly on Counts 95-97 it must find that (1) he "knowingly and willfully sold or delivered firearms to persons who the

defendant knew ... did not reside in West Virginia," and (2) "the person to whom the firearm was transferred was not a licensed ... dealer." J.A. 164. The district court correctly instructed the jury that the willfulness (and knowledge) requirement in section 922(b)(3) applies to each of the elements of that offense, specifically (1) the sale of a firearm (2) to an out-of-state resident. The willfulness (and knowledge) requirement does not apply to the "dealer to dealer" provision in section 922(b), which is an exception to the statute's application and not an element of the offense. Accordingly, there was no error in the instruction because the government was not required to prove that Kelly knew that the transferee was not a federally licensed firearms dealer.

2.

Kelly's other challenges to his conviction on Counts 95-97 are meritless. After reviewing the record, we conclude that the convictions on these counts were supported by sufficient evidence. Furthermore, we conclude that the district court did not abuse its discretion in admitting agent Vasquez's expert testimony that the M-14 receivers seized from Kelly's residence could "readily be converted" to fire ammunition. *See* 18 U.S.C. § 921(a)(3) (stating the definition of "firearm").[1]

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[1] We also affirm the district court's order denying Kelly's motion for attorney's fees with respect to Counts 1-84 and 127-204 because the government's prosecution on these counts was not "vexatious, frivolous, or in bad faith." *In re 1997 Grand Jury*, 215 F.3d 430, 436 n. 8 (4th Cir.2000). Significantly, the BATFE informed Kelly that it considered the receivers in his possession to be machineguns well before the government initiated criminal proceedings against him.

III.

We next consider the appeal filed by Kelly and six other claimants (collectively, "Kelly") of the district court's order granting summary judgment to the government on its *in rem* forfeiture claim. The central question is whether the MKS M-14A guns seized by the BATFE agents are "machineguns" as defined in 26 U.S.C. § 5845(b). According to the definition, "The term 'machinegun' means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger." In this civil forfeiture action the government has the initial burden to establish probable cause to believe that the seized items were unlawful machineguns. The burden then shifts to the claimants to show by a preponderance of the evidence that the guns were improperly seized. *See United States v. One TRW, Model M14, 7.62 Caliber Rifle,* 441 F.3d 416, 419 (6th Cir.2006).

It is undisputed that the defendant MKS M-14As could not shoot automatically at the time of their seizure. In support of its motion for summary judgment the government introduced a videotaped deposition in which BATFE agent Vasquez made the MKS M-14A shoot automatically in approximately fifty minutes. (The parties stipulated that the MKS M-14A used in the deposition was representative of the defendant firearms.) Vasquez used three common tools to modify the weapon, including a Dremmel drill, a carbide burr, and a Tig welder. He also testified that the spare parts used to restore the weapon could be purchased for approximately $79.00.

Agent Vasquez's restoration of the MKS M-14A established probable cause to believe that the receivers were machineguns. Indeed, two other circuit courts have held that the MKS M-14As sold by Kelly were machineguns under the definition in § 5845(b). *One TRW,* 441 F.3d 416; *United States v. TRW Rifle 7.62X51MM Caliber,* 447 F.3d 686 (9th Cir.2006). In both cases the courts determined that the MKS M-14As could be "readily restored," even assuming restoration times that significantly exceeded fifty minutes. *One TRW,* 441 F.3d at 423 (four to six hours); *TRW Rifle,* 447 F.3d at 692 (two hours); *see also United States v. Smith,* 477 F.2d 399, 400 (8th Cir.1973) (eight hours).

Kelly argues, however, that "the statute must be applied not based upon the knowledge and skills of an expert and what an expert may be able to accomplish, but upon the knowledge and skills of an ordinary person." Appellant's Br. at 17. We reject Kelly's argument for two reasons. First, because semi-automatic weapons are complex instruments, any restoration for automatic firing will necessarily require some degree of experience or expertise. Accordingly, it makes little sense to inquire whether a gun can be readily restored by the ordinary person. Second, the level of expertise required to restore the weapon is just one factor that we consider in determining whether a weapon may be readily restored to shoot automatically. In addition to expertise, we consider the time, equipment, and cost necessary to restore the weapon. *See One TRW,* 441 F.3d at 422 (listing factors); *United States v. Aguilar-Espinosa,* 57 F.Supp.2d 1359, 1362 (M.D.Fla.1999) (same). Thus, a weapon that requires significant expertise to be

restored may nevertheless be considered a machinegun if the restoration can be done quickly and with little expense.

In any event, Kelly has not offered evidence to rebut agent Vasquez's expert testimony that the MKS M-14A can be readily restored to fire automatically. Kelly did not show that the restoration process would require significant expertise, specialized tools, or a great expenditure of time and money. Thus, Kelly has not met his burden to prove by a preponderance of the evidence that the receivers were seized unlawfully.

We have also carefully considered Kelly's other arguments for reversal of the summary judgment: (1) that the MKS M14A receiver was not designed to shoot automatically within the meaning of 26 U.S.C. § 5845(b); (2) that § 5845(b) is unconstitutionally vague; and (3) that no deference is owned to the government in the interpretation of § 5845(b). We conclude that each of these arguments is without merit.

For these reasons, we affirm the district court's order granting summary judgment to the government in the forfeiture action.

IV.

We affirm Kelly's convictions, the district court's order denying Kelly's motion for attorney's fees, and the district court's forfeiture order.

AFFIRMED

UNITED STATES COURT OF APPEALS
for the
Fourth Circuit

No. 05-4775
CR-03-50

JUDGMENT
Filed: August 14, 2007

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MICHAEL J. KEELY, SR.,

Defendant - Appellant.

No. 06-1421
1:04-cv-00041-IMK

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

M-K SPECIALTIES, Model M-14 Machinegun Serial Numbers: 1447797, 21954, 1082375, 1394870, 539240, 680531, 1506762, 1335989, 1359769, 1020490, 49488, 1157650, 1181446, 1325123, 1392697, 1434500, 1478082, 1497879, 1560920, 1573826, 217140, 223003,

26268, 336512, 376163, 39524, 419875, 48678, 5175, 575495, 828590, 947264, 977294, 1331982,

Defendant

and

MICHAEL J. KELLY, SR.; WILLIAM A. THOMAS; GARY K. BEACH; ALLEN FEHLINGS; CECIL P. SMITH, JR.; EUGENE GZSANKA; DONALD P. SASS,

Claimants-Appellants,

and

ANTHONY J. FABIAN; FRANK BLISS; MATHEW C. HEALEY; RICHARD J. VIEIRA

Claimants

Appeal from the United States District Court for the Northern District of West Virginia at Clarksburg

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In accordance with the written opinion of this Court filed this day, the Court affirms the judgments of the District Court.

A certified copy of this judgment will be provided to the District Court upon issuance of the mandate. The judgment will take effect upon issuance of the mandate.

/s/ Patricia S. Connor
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
September 11, 2007

No. 05-4775
CR-03-50

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MICHAEL J. KEELY, SR.,

Defendant - Appellant.

No. 06-1421
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v.

M-K SPECIALTIES, Model M-14 Machinegun Serial Numbers: 1447797, 21954, 1082375, 1394870, 539240, 680531, 1506762, 1335989, 1359769, 1020490, 49488, 1157650, 1181446, 1325123, 1392697, 1434500, 1478082, 1497879, 1560920, 1573826, 217140, 223003, 26268, 336512, 376163, 39524, 419875, 48678, 5175, 575495, 828590, 947264, 977294, 1331982,

Defendant

and

MICHAEL J. KELLY, SR.; WILLIAM A. THOMAS; GARY K. BEACH; ALLEN FEHLINGS; CECIL P. SMITH, JR.; EUGENE GZSANKA; DONALD P. SASS,

Claimants-Appellants,

and

ANTHONY J. FABIAN; FRANK BLISS; MATHEW C. HEALEY; RICHARD J. VIEIRA

Claimants

On Petition for Rehearing and Rehearing En Banc

The appellants' petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel composed of Chief Judge Williams, Judge Michael, and Judge Gregory.

For the Court,
/s/ Patricia S. Connor
CLERK

FILED
FEB 11 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-776

In the Supreme Court of the United States

MICHAEL J. KELLY, SR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether former 18 U.S.C. 922(v)(1) (2000), which banned the manufacture, transfer, or possession of semiautomatic assault weapons, violated the Second Amendment.

2. Whether three illegal firearms in this case were lawfully seized when officers conducting a warrant-authorized search observed the firearms in "plain view."

3. Whether former Section 922(v)(1) exceeded Congress's authority under the Commerce Clause.

4. Whether the district court, in determining that particular firearms could be "readily restored" to automatic firing capability, properly relied on expert testimony demonstrating that such restoration could readily be achieved by a person with relevant technical expertise.

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In the Supreme Court of the United States

No. 07-776

MICHAEL J. KELLY, SR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is not published in the Federal Reporter but is available at 2007 WL 2309761.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 2007. A petition for rehearing was denied on September 11, 2007 (Pet. App. 16a-17a). The petition for a writ of certiorari was filed on December 10, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of West Virginia, petitioner Kelly was convicted on three counts of the unlawful

transfer of a firearm to a non-resident, in violation of 18 U.S.C. 922(b)(3); one count of unlawful possession of a semiautomatic assault weapon, in violation of 18 U.S.C. 922(v)(1) (2000);[1] and two counts of unlawful possession of a machinegun, in violation of 26 U.S.C. 5861(d). The district court sentenced him to 24 months of imprisonment. The government also filed a civil forfeiture action against 34 firearms, in which the district court granted the government's motion for summary judgment. See Pet. App. 3a-5a.

Kelly appealed his convictions. Six claimants for the firearms appealed the district court's grant of summary judgment in the civil forfeiture action. The court of appeals consolidated the appeals and affirmed the judgments in both the criminal and civil cases. Pet. App. 1a-13a.

1. Kelly owned the MKS gun dealership in Grafton, West Virginia. He specialized in manufacturing and distributing the MKS M-14A, a gun manufactured using receivers from decommissioned M-14 machineguns. In June 2001, Bureau of Alcohol, Tobacco, Firearms and Explosives (BATF) agents informed Kelly that the M-14 receivers that he was using constituted "machinegun[s]," as defined in 26 U.S.C. 5845(b), that Kelly was not authorized to possess. The BATF served a cease-and-desist letter on Kelly, who nevertheless continued to manufacture his firearms. Pet. App. 3a-4a.

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[1] Former Section 922(v)(1) made it unlawful for a person to "manufacture, transfer, or possess a semiautomatic assault weapon." 18 U.S.C. 922(v)(1) (2000). Under the terms of the statute in which it was originally enacted, former Section 922(v)(1) ceased to be effective on September 13, 2004. See Public Safety and Recreational Firearms Use Protection Act, Pub. L. No. 103-322, § 110105(2), 108 Stat. 2000.

On July 24, 2002, the BATF executed a search warrant at Kelly's residence, which also served as his place of business. The warrant authorized the agents to search for MKS M-14 receivers, firearms having such receivers, and various documents. BATF agent Richard Vasquez, a Firearms Enforcement Officer, accompanied the agents to Kelly's residence to help the agents identify firearms and to answer any technical questions that the agents might have. Pet. App. 4a; Gov't C.A. Br. 7.

During the search, the agents located, *inter alia*, an Uzi machinegun receiver, a Maadi semiautomatic assault rifle, and an FAL semiautomatic assault rifle. The agents brought those three firearms to Agent Vasquez. Agent Vasquez immediately observed that the Maadi and the FAL were unlawful firearms because the Maadi had a folding stock and pistol grip, and the FAL had a detachable magazine, a pistol grip, flash suppressor, grenade launcher, and bayonet lug. Agent Vasquez also immediately noticed that the Uzi had a discolored area and grinding marks on the outside of the receiver where a "bolt block" would normally be located. The Uzi receiver had originally been manufactured as a semiautomatic weapon with a bolt block to prevent it from firing automatically, *i.e.*, from operating as a machinegun. Believing that the Uzi had been illegally modified, Agent Vasquez opened the top cover of the receiver and confirmed that the bolt block had been removed, making the receiver an illegal machinegun. The agents then seized the Uzi. Pet. App. 4a; Gov't C.A. Br. 7-9; C.A. Supp. App. 44-53, 90-92.

2. The statutory definition of "machinegun" encompasses "any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single

function of the trigger." 26 U.S.C. 5845(b). During its in rem action seeking forfeiture of 34 MKS M-14As, the government filed a motion for summary judgment, which included a videotaped deposition from BATF Agent Vasquez. To establish that the MKS M-14As (which could not shoot automatically when seized) could be "readily restored to shoot[] automatically," Agent Vasquez, during the videotaped deposition, modified one of the weapons in approximately 50 minutes so that it was capable of automatic fire. Agent Vasquez used three common tools to modify the weapon, and he testified that the spare parts used for that purpose would cost approximately $79. Petitioners presented no evidence to rebut Agent Vasquez's expert testimony. The district court granted summary judgment for the government. Pet. App. 11a, 13a.

3. The court of appeals affirmed. Pet. App. 1a-13a.

a. The court of appeals held that the seizure of the Uzi, Maadi, and FAL firearms, which were not identified in the search warrant as items to be seized, was justified under the "plain view" exception to the warrant requirement. Pet. App. 6a-7a. The court explained that "[u]nder the plain view doctrine law enforcement officers may seize an object without a warrant if (1) the officers are 'lawfully in a position from which they view an object,' (2) the object's incriminating character is 'immediately apparent,' and (3) the officers have a 'lawful right of access to the object.'" *Id.* at 6a (quoting *Minnesota* v. *Dickerson*, 508 U.S. 366, 375 (1993)). Petitioners argued that the second of those requirements was not satisfied because the illicit nature of the firearms was not immediately apparent to the agents who discovered the weapons and took them to Agent Vasquez for inspection. *Ibid.* The court of appeals rejected that contention. *Id.*

at 6a-7a. The court explained that, even if an item's illicit character is not manifest "at the precise moment" a searching officer first notices the item, the "immediately apparent" requirement of the "plain view" doctrine is satisfied so long as the illegality becomes evident in the course of the search without the benefit of information derived from an unlawful search or seizure. *Ibid.* (citing *United States* v. *Garces*, 133 F.3d 70, 75 (D.C. Cir. 1998)). The court concluded that, because the BATF agents who first observed the three guns "did not unlawfully search or seize the three weapons prior to the time Vasquez determined that they were possessed unlawfully," the seizure of the firearms was legal under the "plain view" doctrine. *Id.* at 7a.

b. The court of appeals held that former Section 922(v)(1) was a permissible exercise of congressional authority under the Commerce Clause. Pet. App. 7a-8a. The Court explained that "[t]he Commerce Clause authorizes Congress to regulate 'those activities that substantially affect interstate commerce,'" *id.* at 8a (quoting *United States* v. *Lopez*, 514 U.S. 549, 559 (1995)), and that "[t]he ban on the possession of semiautomatic assault weapons was plainly intended to reduce the flow of those weapons in interstate commerce," *ibid.* (citing *Navegar Inc.* v. *United States*, 192 F.3d 1050, 1058 (D.C. Cir. 1999), cert. denied, 531 U.S. 816 (2000)). The court further observed that "[r]egulations of intrastate activities that affect the supply or demand of a commodity are well within Congress' Commerce Clause powers." *Ibid.*

c. The court of appeals rejected petitioner Kelly's argument that the ban on semiautomatic assault weapons imposed by former Section 922(v)(1) violated his Second Amendment right to bear arms. Pet. App. 8a-9a. The court relied on circuit precedent that had "adopted

the collective rights theory, interpreting the Amendment to protect the states' right to organize and arm militias." *Id.* at 8a (citing *Love* v. *Pepersack*, 47 F.3d 120 (4th Cir.), cert. denied, 516 U.S. 813 (1995)). Because "Kelly ha[d] not made any showing that he possessed the semi-automatic assault weapons in connection with membership in a state militia," the court rejected his Second Amendment claim. *Id.* at 9a.

d. The court of appeals affirmed the district court's grant of summary judgment to the government on its forfeiture claim. Pet. App. 11a-13a. The court held that Agent Vasquez's restoration of the MKS M-14A established probable cause to believe that the seized weapons fell within the statutory definition of "machinegun." *Id.* at 11a-12a (citing 26 U.S.C. 5845(b)). The court noted that "two other circuit courts have held that the MKS M-14As sold by Kelly were machineguns under the definition in § 5845(b)." *Id.* at 12a (citing *United States* v. *One TRW, Model M14, 7.62 Caliber Rifle*, 441 F.3d 416 (6th Cir. 2006), and *United States* v. *TRW Rifle 7.62X51MM Caliber*, 447 F.3d 686 (9th Cir. 2006)). The court of appeals further observed that Kelly had not offered evidence to rebut Agent Vasquez's testimony, or to show that the process of converting the MKS M-14As to automatic firing capability would be difficult, time-consuming, or expensive. *Id.* at 13a.

DISCUSSION

1. Petitioners contend (Pet. 10-11) that former 18 U.S.C. 922(v)(1) (2000), which banned private possession of semiautomatic assault weapons, violated the Second Amendment. Because former Section 922(v)(1) ceased to be effective on September 13, 2004, see note 1, *supra*, the question presented lacks prospective significance.

As petitioners explain (Pet. 11), however, this Court's decision in *District of Columbia* v. *Heller*, No. 07-290 (to be argued Mar. 18, 2008), may bear on the proper disposition of petitioners' Second Amendment claim.

Heller presents the question whether certain District of Columbia gun-control statutes, and particularly the District's ban on private possession of handguns, violate the Second Amendment. The Court's decision in that case may clarify the Second Amendment principles that govern legislative efforts to ban or regulate categories of firearms that are determined to pose a particular danger of criminal misuse. The petition for a writ of certiorari therefore should be held pending this Court's decision in *Heller* and then disposed of accordingly.

2. Petitioners contend (Pet. 11-20) that an unconstitutional search and seizure occurred when the officers who first discovered the Uzi, Maadi, and FAL firearms took those weapons to Agent Vasquez (who was present at the scene) so that Agent Vasquez could determine whether those weapons were illegal. That claim lacks merit and does not warrant this Court's review.

a. Under the "plain view" doctrine, law-enforcement officers may seize private property without a warrant if the officers are lawfully in a position where they can view an object, the object's incriminating character is "immediately apparent," and the officers have a lawful right of access to the object. *Minnesota* v. *Dickerson*, 508 U.S. 366, 375 (1993). "An example of the applicability of the 'plain view' doctrine is the situation in which the police have a warrant to search a given area for specified objects, and in the course of the search come across some other article of incriminating character." *Horton* v. *California*, 496 U.S. 128, 135 (1990) (quoting *Coolidge* v. *New Hampshire*, 403 U.S. 443, 465 (1971)

(opinion of Stewart, J.)) (internal quotation marks omitted). Petitioners do not dispute that the searching officers in this case were lawfully in a position to view the Uzi, Maadi, and FAL firearms, or that the officers had a lawful right of access to those weapons. Rather, petitioners contend that the incriminating character of the firearms was not "immediately apparent" within the meaning of this Court's decisions because the officers who first observed the guns did not know whether they were unlawful.

Under this Court's "plain view" decisions, an item's incriminating character is "immediately apparent" if officers who observe the object have probable cause to believe that it is illegal. See *Dickerson*, 508 U.S. at 375; *Horton*, 496 U.S. at 142; *Arizona* v. *Hicks*, 480 U.S. 321, 326 (1987). And in determining whether the requisite probable cause exists, a reviewing court considers the *collective* knowledge of the searching officers on the scene. See, *e.g.*, *United States* v. *Waldrop*, 404 F.3d 365, 369-370 (5th Cir. 2005); *United States* v. *Wells*, 98 F.3d 808, 810 (4th Cir. 1996); *United States* v. *Menon*, 24 F.3d 550, 561-562 (3d Cir. 1994); *United States* v. *Newton*, 788 F.2d 1392, 1395 (8th Cir. 1986). Thus, when several agents search a residence pursuant to a warrant, an item's incriminating character may be "immediately apparent" even though the first officer who sees the item does not instantly recognize its illicit nature, so long as the officers ultimately make a valid collective judgment that there is probable cause to seize the item. See *Menon*, 24 F.3d at 561-563; *United States* v. *Garces*, 133 F.3d 70, 75-76 (D.C. Cir. 1998); *United States* v. *Johnston*, 784 F.2d 416, 419-421 (1st Cir. 1986). A contrary rule, under which the probable cause determination depended upon the level of expertise of the first

officer to observe a particular item, would impede efficient investigative practices to no good purpose, by leading police to designate the most knowledgeable officer to do all the searching, or to have multiple officers search the entire area. See *Menon*, 24 F.3d at 563.

b. Petitioners' reliance (Pet. 13-14) on *Hicks* is misplaced. In *Hicks*, a police officer entered a residence without a warrant and then moved a stereo turntable as part of his investigation. 480 U.S. at 323. By moving the turntable, the officer was able to observe its serial number, which had previously been concealed from view, and was ultimately able to ascertain that the turntable was stolen. *Ibid.* This Court held that the movement of the turntable was a search because it "exposed to view concealed portions of the apartment or its contents," *id.* at 325, and that the search was not justified by the "plain view" doctrine because the officer lacked probable cause (until he observed the serial number) to believe that the item was incriminating, *id.* at 326-327.

Petitioners suggest (Pet. 14) that the movement of the three firearms by the officers who initially discovered them was analogous to the movement of the turntable in *Hicks*. Unlike the movement of the turntable in *Hicks*, however, the officers' movement of the firearms in this case was not intended to reveal information about the weapons that had previously been concealed from view, and there is no evidence that the officers' conduct had that effect. Rather, the officers moved the firearms in order to facilitate their inspection by Agent Vasquez, who was on the scene precisely because of his greater

technical expertise, and who "immediately determined that the firearms were illegal." Pet. App. 4a.[2]

The Court in *Hicks* did not address the question whether the transfer of items from one searching officer to another is permissible in this situation. Other courts of appeals that have confronted that question, however, have held (like the Fourth Circuit in this case) that an officer who first observes a potentially incriminating item while executing a search warrant may take the ob-

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[2] Petitioners contend (Pet. 19) that "[t]he 'incriminating character' of the three firearms was * * * not 'immediately apparent' to Vasquez" because (1) Agent Vasquez removed the top cover of the Uzi in order to confirm "that there was no block welded to the interior wall" (meaning that the Uzi was capable of automatic fire), (2) Agent Vasquez was not shown to have been aware that the Uzi was not lawfully registered in the National Firearms Registration and Transfer Record (NFRTR), and (3) Agent Vasquez could not immediately determine whether the Maadi and FAL rifles had been lawfully possessed before September 13, 1994 (in which case former Section 922(v)(1) would not have barred their continued possession). Those arguments lack merit. Agent Vasquez testified that he immediately noticed "grind marks on the side of the [Uzi] receiver," from which he inferred that "the block inside the receiver had been removed." C.A. Supp. App. 91; see *id.* at 47, 52. That observation gave Agent Vasquez probable cause to believe that the Uzi was a machinegun, and he then properly opened the top cover to confirm that conclusion. See *id.* at 52, 91-92; cf. *Hicks*, 480 U.S. at 326 (explaining that, if the police have probable cause to seize an item found in "plain view," they can also conduct a "closer examination" amounting to a search). Similarly with respect to petitioners' other two points, the mere possibility that one or more of the three firearms fell within a statutory exception to the general bans on possession of machineguns and semiautomatic assault rifles would not negate the existence of probable cause. Moreover, the government's affidavit in support of the warrant application specifically noted that the affiant had caused a search of the NFRTR to be conducted and that the search had revealed no firearms registered to Kelly or his company. See C.A. Supp. App. 38.

ject to another officer or officers so that the group can make a collective judgment as to the presence or absence of probable cause. See *Garces*, 133 F.3d at 74; *Menon*, 24 F.3d at 560-562; *Johnston*, 784 F.2d at 419-421. Petitioners' contention that all movement of the relevant items was proscribed is particularly unavailing under the circumstances of this case. The warrant authorized seizure of "[a]ll MKS M-14 receivers and all MKS M14A1 receivers *and/or firearms utilizing the aforementioned receivers*." Pet. App. 4a (emphasis added; brackets in original). Execution of the warrant therefore necessarily required the searching officers to conduct the examination necessary to determine whether each of the firearms they discovered possessed the type of receiver referenced in the warrant.[3]

c. Even if the movement of the three firearms to facilitate their inspection by Agent Vasquez had been an unlawful search or seizure, suppression of those items at Kelly's trial would still have been inappropriate. Rather than carry the firearms to Agent Vasquez, the officers might have brought Agent Vasquez to the firearms to

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[3] In addition, officers executing a search warrant have substantial authority to take ancillary measures to protect their own safety during the conduct of the search. See *Muehler* v. *Mena*, 544 U.S. 93, 100 (2005) (holding that individuals were permissibly detained in handcuffs for between two and three hours to prevent threats to officer safety during the execution of a search warrant); cf. *Maryland* v. *Buie*, 494 U.S. 325, 334 (1990) (holding that officers carrying out an arrest may conduct a protective sweep of adjoining areas from which an attack might be launched). Based on that rationale, the officers in this case might have inspected the firearms they found and/or moved those guns to a secure location within Kelly's residence in order to guard against their misuse by outsiders during the conduct of the search, even after verifying that particular weapons were not subject to seizure under the terms of the warrant.

allow him to verify that the weapons were illegal, at which point the guns could lawfully have been seized. Any constitutional violation in the agents' movement of the guns therefore was not the cause of the ultimate seizure. For that reason, suppression of the weapons would have been inappropriate even if a Fourth Amendment violation had occurred. See *Hudson* v. *Michigan*, 126 S. Ct. 2159, 2164 (2006) (explaining that "but-for causality is * * * a necessary * * * condition for suppression"); cf. *Menon*, 24 F.3d at 561 (noting that officer to whom potentially suspicious documents were brought might have acquired the same information by inspecting the documents at the location where another officer found them).

d. Contrary to petitioners' contention (Pet. 14-18), no circuit conflict exists on the question presented here. In *United States* v. *Szymkowiak*, 727 F.2d 95, 96 (6th Cir. 1984), state police officers executing a search warrant for jewelry and a television found a firearm. Because the officers were unable to determine whether the firearm was legal, they called a BATF agent, who arrived at the scene approximately 30 minutes later. *Ibid.* Based on the BATF agent's view that the firearm probably violated state law, the state agents seized the firearm. *Ibid.* The Sixth Circuit held that the firearm should have been suppressed. See *id.* at 99.

Petitioners rely (Pet. 15) on the Sixth Circuit's statement that the incriminating character of the firearm was not "immediately" apparent because "the executing officers who discovered the weapon could not '*at the time*' of discovery determine whether its possession was unlawful." *Szymkowiak*, 727 F.2d at 99 (quoting *United States* v. *Gray*, 484 F.2d 352, 356 (6th Cir. 1973), cert. denied, 414 U.S. 1158 (1974)). In *Szymkowiak*, however,

the BATF agent was not part of the original search team, and he arrived at the scene approximately 30 minutes after the searching officers had found the gun. The Sixth Circuit accordingly had no occasion to address the situation presented here, where the law enforcement officer who immediately recognized the firearms' incriminating nature accompanied the other searching officers to provide technical expertise and was on the scene when the firearms were first discovered.[4]

Petitioners' reliance (Pet. 15-16) on *Shamaeizadeh* v. *Cunigan*, 338 F.3d 535 (6th Cir. 2003), cert. denied, 541 U.S. 1041 (2004), is likewise misplaced. Petitioners rely on the statement in *Shamaeizadeh* that an "item is not immediately incriminating" if "further investigation is required to establish probable cause as to its association with criminal activity." *Id.* at 555 (quoting *United States* v. *McLevain*, 310 F.3d 434, 443 (6th Cir. 2002)). As in *Szymkowiak*, however, the court was not presented with a situation in which the only "further investigation" necessary to verify an item's incriminating character was to show an object found in plain view to a fellow officer with greater technical expertise. The decision in *Shamaeizadeh* therefore has no meaningful bearing on the question presented here.

The other court of appeals decisions cited by petitioner (Pet. 16-18) are likewise inapposite. In *United States* v. *Brown*, 79 F.3d 1499 (7th Cir.), cert. denied, 519 U.S. 875 (1996), the court held that a police officer's

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[4] In addition, the language on which petitioners rely was not essential to the outcome in *Szymkowiak*, since the Sixth Circuit also concluded that even the BATF agent lacked probable cause for a seizure. See 727 F.2d at 99. The court's statement that the incriminating nature of the firearm was not apparent to the officers who initially found it was simply an alternative ground for the court's decision. See *ibid.*

seizure of a gun could not be justified under the "plain view" doctrine because the officer recognized the item only as a "shiny chrome metal object of some kind," and not as a firearm, until he searched a privately-owned vehicle to ascertain the object's true nature. See *id.* at 1509. In *United States* v. *Tucker*, 305 F.3d 1193, 1202-1203 (10th Cir. 2002), cert. denied, 537 U.S. 1223 (2003), the court upheld the seizure of a computer under the "plain view" doctrine. Neither of those decisions addressed the question whether, or under what circumstances, one member of a searching team may show a suspicious object to another officer on the team who can better assess its incriminating character.

The District of Columbia Circuit's decision in *Garces* (see Pet. 17-18) is also unhelpful to petitioners. In *Garces*, the court *rejected* the proposition that an item's illicit character must have been recognizable "at the precise moment [the searching officers] first spotted it" in order for the "plain view" doctrine to apply. 133 F.3d at 75 (emphasis omitted). The court explained that, "although the phrase 'immediately apparent' sounds temporal, its true meaning must be that the incriminating nature of the item must have become apparent, in the course of the search, without the benefit of information from any unlawful search or seizure." *Ibid.* Because Agent Vasquez immediately recognized the illicit nature of the Uzi, Maadi, and FAL firearms, without the benefit of any information obtained through an antecedent search of the weapons, *Garces* supports the government's position rather than that of petitioners. See Pet. App. 6a-7a.

3. Petitioners contend (Pet. 20-24) that former Section 922(v)(1) exceeded Congress's authority under the Commerce Clause because its ban on possession of semi-

automatic assault weapons encompassed non-economic activity. Relying in part on the District of Columbia Circuit's decision in *Navegar, Inc.* v. *United States*, 192 F.3d 1050 (1999), cert. denied, 531 U.S. 816 (2000), the court of appeals rejected that challenge. See Pet. App. 7a-8a. This Court denied review in *Navegar* (at a time when Section 922(v) was still in force), and there is no reason for a different result here.

The 1994 amendments to the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213, restricted the manufacture, transfer, and possession of specified weapons. 18 U.S.C. 922(v). Congress sought to prevent interstate commerce in the prohibited firearms by "impos[ing] criminal liability for those activities which fuel the supply and demand for such weapons." *Navegar*, 192 F.3d at 1058. And as the legislative history of the Gun Control Act of 1968 and the 1994 amendments demonstrates, federal regulation of firearms (including assault weapons) has been based in large part on evidence that the nationwide market for firearms renders purely local prohibitions ineffective. *Id.* at 1058-1060.

There is consequently no basis for petitioners' contention (Pet. 21-22) that former Section 922(v)(1) was an invalid regulation of non-economic activity. While it was in effect, Section 922(v)(1) imposed an absolute prohibition on the sale of specified firearms, and that prohibition directly affected volume and price. The fact that the statute served non-economic ends (protection of the public health and safety) as well did not render it an invalid exercise of Congress's Commerce Clause powers. See *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 257 (1964) (Congress may use its Commerce Clause authority to "legislat[e] against moral wrongs" as long as the regulated activity also has the requisite

nexus to interstate commerce.); *Mulford* v. *Smith*, 307 U.S. 38, 48 (1939) ("The motive of Congress in exerting the [commerce] power is irrelevant to the validity of the legislation.").

Contrary to petitioners' suggestion (Pet. 20-22), this Court's decision in *Gonzales* v. *Raich*, 545 U.S. 1 (2005), strongly supports the court of appeals' ruling in this case. The Court in *Raich* held that application of the federal controlled-substances laws to intrastate growers and users of marijuana for medical purposes was a valid exercise of congressional authority under the Commerce Clause. The Court in *Raich* reaffirmed that "Congress can regulate purely intrastate activity that is not itself 'commercial,' * * * if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity." *Id.* at 18.

Petitioners' reliance (Pet. 20-22) on *United States* v. *Lopez*, 514 U.S. 549 (1995), and *United States* v. *Morrison*, 529 U.S. 598 (2000), is likewise misplaced. In holding that the civil-damages provisions of the Violence Against Women Act of 2000, Pub. L. No. 106-386, Div. B, 114 Stat. 1491, exceeded Congress's authority under the Commerce Clause, the Court in *Morrison* concluded that "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity." *Morrison*, 529 U.S. at 613. The Gun-Free School Zones Act of 1990, Pub. L. No. 101-647, § 1702, 104 Stat. 4844 (GFSZA) at issue in *Lopez* was held to have "nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." 514 U.S. at 561. Nor did the restrictions in *Morrison* or *Lopez* form "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regu-

lated." *Ibid.* The GFSZA simply outlawed the possession of a firearm in the vicinity of a school building, and did not form part of a broader regulatory scheme. The restriction imposed a geographic limit on the possession of guns that might otherwise be freely manufactured, sold, and possessed in interstate commerce.

By contrast, as the decision in *Raich* makes clear, legislative measures designed to suppress the national market in a particular article of commerce are legitimate exercises of Commerce Clause authority, even as applied to conduct (*e.g.*, possession of the item by the ultimate recipient) that may be undertaken for non-economic motives. Thus, the courts of appeals have consistently rejected Commerce Clause challenges asserted by individuals convicted of illegal possession of a machinegun. See *United States* v. *Franklyn*, 157 F.3d 90, 93-96 (2d Cir.), cert. denied, 525 U.S. 1027 (1998), and 525 U.S. 1112 (1999); *United States* v. *Wright*, 117 F.3d 1265, 1269-1271 (11th Cir.), cert. denied, 522 U.S. 1007 (1997); *United States* v. *Knutson*, 113 F.3d 27 (5th Cir. 1997); *United States* v. *Rybar*, 103 F.3d 273, 283 (3d Cir. 1996), cert. denied, 522 U.S. 807 (1997); *United States* v. *Kenney*, 91 F.3d 884 (7th Cir. 1996); *United States* v. *Beuckelaere*, 91 F.3d 781 (6th Cir. 1996); *United States* v. *Rambo*, 74 F.3d 948 (9th Cir.), cert. denied, 519 U.S. 819 (1996); *United States* v. *Wilks*, 58 F.3d 1518 (10th Cir. 1995).[5] Congress's au-

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[5] In *United States* v. *Stewart*, 348 F.3d 1132, 1134-1142 (9th Cir. 2003), the court of appeals held that the machinegun ban contained in 18 U.S.C. 922(*o*) was unconstitutional as applied to the defendant's homemade machineguns. This Court granted the government's petition for a writ of certiorari, vacated the Ninth Circuit's judgment, and remanded for further consideration in light of *Raich*. See *United States* v. *Stewart*, 545 U.S. 1112 (2005). On remand, the court of appeals held

thority to regulate in this area is particularly clear with respect to petitioner Kelly, who manufactured and transferred the proscribed firearms as part and parcel of an ongoing commercial enterprise.

4. Petitioners contend (Pet. 24-29) that the district court erred in granting summary judgment for the United States, based on Agent Vasquez's expert testimony, in the government's in rem action for forfeiture of the seized MKS M-14A firearms. That claim lacks merit.

Section 922(*o*) of Title 18 generally prohibits the private possession of a "machinegun." The term "machinegun" is defined as a firearm that "shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger." 26 U.S.C. 5845(b). The Fourth Circuit's decision in this case accords with rulings of two other courts of appeals, which have upheld grants of summary judgment for the government in civil forfeiture actions concerning MKS M-14A firearms manufactured by petitioner Kelly, based in part on Agent Vasquez's expert testimony. See *United States* v. *TRW Rifle 7.62X51MM Caliber*, 447 F.3d 686, 688-693 (9th Cir. 2006); *United States* v. *One TRW Model M14, 7.62 Caliber Rifle*, 441 F.3d 416, 419-425 (6th Cir. 2006).

In concluding that the MKS M-14As could be "readily restored" to automatic firing capability, the court of appeals focused on whether the firearms could be restored by a person with relevant technical expertise, not on whether an "ordinary person" would be capable of performing the task. Pet. App. 12a. Petitioners

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that Section 922(*o*) was constitutional as applied and accordingly affirmed Stewart's convictions. *United States* v. *Stewart*, 451 F.3d 1071, 1073-1078 (9th Cir. 2006).

contend (Pet. 25) that the court's construction of the phrase "readily restored" conflicts with this Court's decision in *Chicago* v. *Morales*, 527 U.S. 41 (1999). Petitioners' reliance on *Morales* is misplaced.

The Court in *Morales* reconfirmed the general principle that a criminal statute may be unconstitutionally vague if it fails to "provide the kind of notice that will enable ordinary people to understand what conduct it prohibits." 527 U.S. at 56. When a statute is alleged to be impermissibly vague, the constitutional inquiry thus focuses on whether "ordinary people" are able to comprehend the relevant criminal prohibition, not on whether "ordinary people" are capable of engaging in the primary conduct to which the statute refers. As the court of appeals recognized, "because semiautomatic weapons are complex instruments, any restoration for automatic firing will necessarily require some degree of experience or expertise." Pet. App. 12a. In light of that fact, persons of ordinary intelligence would understand the phrase "readily restored" in 26 U.S.C. 5845(b) to refer to the potential for restoration by a person knowledgeable in the field, not by an unschooled individual.

Petitioners further contend that "[t]he term 'restored' perforce means that an object was previously in a particular condition and has been returned to that previous condition" (Pet. 28), and that "[t]he process undertaken by Vasquez was not a restoration, but a conversion" (Pet. 29 n.9). As the Ninth and Sixth Circuits have recognized, that argument overlooks the fact that MKS M-14A firearms are manufactured out of parts from M-14 machineguns, which are capable of automatic fire. See *TRW Rifle 7.62X51MM Caliber*, 447 F.3d at 691-692; *One TRW Model M14, 7.62 Caliber Rifle*, 441 F.3d at 425. For that reason, the modification process that

Agent Vasquez demonstrated constitutes "restor[ation]" of the weapons to automatic firing capability within the meaning of 26 U.S.C. 5845(b).

CONCLUSION

With respect to the first question presented, the petition for a writ of certiorari should be held pending this Court's decision in *District of Columbia* v. *Heller*, No. 07-290 (to be argued Mar. 18, 2008), and then disposed of as appropriate in light of that decision. In all other respects, the petition should be denied.

Respectfully submitted.

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